Filed 5/14/08 In re Aaron L. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re AARON L., et al., Persons Coming Under the Juvenile Court Law.	B200521 (Los Angeles County Super. Ct. No. CK59829)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AUDREY B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Debra Losnick, Commissioner. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Audrey B. (Mother) appeals from the juvenile court's summary denial of her section 388[1] petition by which she sought to regain custody of her two children or, alternatively, to obtain reinstatement of reunification services. We conclude the juvenile court did not abuse its discretion in finding that Mother had failed to make a prima facie showing that her proposed change would be in the best interests of the children. We therefore affirm the order denying the petition without a hearing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Initial Proceedings in the Juvenile Court*

In July 2005, the Department of Children and Family Services (Department) filed a section 300 petition in regard to Mother's two children: Aaron L., born in April 2003 and Ashley L., born in May 2004. Aaron L. is autistic.

Following a contested hearing conducted in November 2005, the juvenile court sustained the petition. It found that Aaron had developmental problems which Mother had failed to have assessed and that her failure in that regard placed him at risk of physical harm. In addition, the court found that Mother's neglect had resulted in both children living in "extremely filthy and unsanitary" conditions for the prior nine months. The court also sustained the petition's allegation that the children's father (Lionel L.) had a history of engaging in physical altercations with

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[1] All undesignated statutory references are to the Welfare and Institutions Code.

Mother which placed the children at risk.[2] The court appointed Dr. Ward to examine Mother. (Evid. Code, § 730.) Department was ordered to increase the frequency and duration of Mother's visits. The children remained at a foster care center for two months until they moved to the home of their paternal grandparents.

Dr. Ward evaluated Mother in November 2005. His report concluded that "all of the test, clinical, and historical data clearly suggest that not only is she an extremely defensive and non-insightful individual, but that she most likely does have a serious underlying psychiatric disorder, along the lines of a thought disorder, which clearly seems to have a very negative effect on her overall cognitive efficiency and organization." He observed that there was "a certain paranoid/delusional quality to aspects of her thinking." Because "unrecognized and/or untreated mental illness can often preclude" an individual being able to adequately parent their children, he concluded that Mother needed to recognize that she had a mental illness and accept appropriate treatment.

The juvenile court conducted the disposition hearing in March 2006. It removed the children from Mother's custody and ordered reunification services. Mother was ordered to participate in a psychiatric evaluation, to attend individual counseling, domestic violence counseling, and parent education classes.

2. *Review Proceedings in the Juvenile Court*

In June 2006, Department submitted a status review report. It indicated that Aaron and Ashley were "thriving in the care of [their] paternal grandparents." Mother had completed parenting classes and attended 10 domestic violence classes but had not yet enrolled in individual counseling or participated in a psychological

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[2] Lionel L. was in prison during the pendency of the trial court proceedings. He is not a party to this appeal.

evaluation. According to the social worker, mother "continue[d] to have a difficult time accepting the fact that her children were detained," persisted in denying the allegations in the sustained section 300 petition, denied she had any psychiatric problems, and insisted she had been "framed." Mother's monitored visits with her children "usually [went] well." The court directed Mother to bring documentation of her compliance with the case plan to the next hearing.

The next contested hearing was conducted in November 2006. Dr. O'Day, a clinical psychologist at the Arcadia Mental Health Center where Mother had been receiving services since April 2006, submitted an evaluation of Mother's mental health.[3] Because his letter lacked any actual diagnosis or treatment plan, the parties and the court agreed it was not helpful. Consequently, the court ordered Dr. Ward to re-evaluate Mother. Over Department's objections, the court continued reunification services, directed Department to find a new therapist for Mother, and reset the contested review hearing.

The 18-month review hearing was ultimately conducted on February 15, 2007. Mother failed to attend the hearing but was represented by counsel. Dr. Ward, who had conducted a two-hour session with Mother, submitted a 35-page report. Dr. Ward explained that Mother "basically presented about the same" as

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[3] Additionally, Mother had retained Dr. Garg in July 2006 to conduct a psychiatric evaluation of her. Dr. Garg forwarded her evaluation to Department. Department concluded that it was "inadequate due to the fact information provided by mother was untrue and is inconsistent with information she has provided to [the social worker] and Dr. Ward." Thereafter, the social worker provided Dr. Garg with copies of all its reports as well as Dr. Ward's (first) report and asked Dr. Garg to conduct another evaluation of Mother. Dr. Garg failed to do so and, instead, simply orally informed the social worker that she had noted no mental impairments in Mother. In subsequent trial court proceedings, Mother's attorney made no reference to Dr. Garg or her findings.

she had a year earlier.[4] Her thinking was "still quite disorganized and problematic," possibly the result of a "thought disorder."[5] Dr. Ward noted that his characterization of Mother's thought processes was consistent with what other professionals, including Dr. O'Day,[6] had observed. Dr. Ward found Mother to be

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[4] Mother claims that Dr. Ward had found that she had presented "changed behavior" in this (second) interview. Not so. Her claim takes out of context one statement (which we italicize) from his report. The relevant portion of Dr. Ward's report is the following:

> "In very general terms, I would say that the mother basically presented about the same this time around as she did approximately one year ago when I initially saw her. As was true last year, she was pleasant and cooperative during the evaluation process and procedures. However, and as I specifically noted in my report last year, she 'definitely tests and presents as someone who may well have some significant psychiatric/psychological type problems.' As I went on to say in my report, there is definitely an overall disorganized quality to her thinking, and I did think she may well have a thought disorder. However, I would have to note that unlike last year, *she did not present with the same paranoid/delusional flavor that was somewhat present last year*, and which further underscored the possibility of a thinking disorder. This is not to say she does not have any paranoid/delusional thinking at this point in time, only that it did not surface during my clinical interview of her, which was somewhat different than the last time, in that I told her I was not going to go over the whole case history, which is how a lot of that paranoid/delusional material came up in the first place. Nevertheless, it is possible that she simply does not have as much paranoid/delusional type qualities to her thinking as appears to have been present in the past. However, there is no doubt that her thinking is still quite disorganized and problematic." (Italics added.)

[5] Dr. Ward was unable to render a specific diagnosis but opined it "could actually be a combination of factors, such as learning disability, psychiatric problems, and perhaps even some underlying neuropathology that has been undetected."

[6] Dr. O'Day's letter of October 25, 2006 to Mother's social worker noted that Mother had "somewhat 'odd' reasoning." A November 6, 2006 follow-up letter from him stated that Mother "continues to express 'odd' thinking, at times. It is unknown whether this 'odd' thinking might be a reflection of a learning disability or a thought disorder."

"extremely defensive, non-insightful, and lacking in judgment." Mother still maintained that there was no truth whatsoever to the allegations in the sustained section 300 petition and claimed that she had always taken excellent care of her children.

Dr. Ward also observed a monitored one-hour visit between Mother and her two children. He believed her visit with Ashley "went fairly well and there definitely does appear to be some bond there." But in regard to Aaron, the boy "was extremely out of control" and Mother "was simply totally unable to control him, calm him down, set limits, etc." Dr. Ward concluded that Mother was "simply not capable of being entrusted with the full-time, independent care and custody" of her children, one of whom is autistic. He also believed that her visits with her children should continue to be monitored because of Mother's inability to deal with Aaron.

Department's reports, prepared in December 2006 and February 2007, indicated the following. In early December, Mother's social worker had found a therapist for Mother. She gave Mother the relevant information and, on several occasions, encouraged her to make an appointment. Mother failed to do so. Instead, in January 2007, Mother chose another counseling center where she attended three therapy sessions but missed one session.

As for Mother's relationship with her children, Department reported that during a monitored visit in January 2007, Mother responded defensively when it was pointed out that she was inappropriately questioning her children. Mother told the monitor: "These are my kids and I can say what I want." At the end of the visit and in front of her children, Mother said to the monitor: "You ain't shit. . . . Everybody is against me, just because you['re] white and their [*sic*] white, I could

say whatever I want, I had them from my vagina." Conceding that Mother was "well meaning," Department concluded that "her emotional and mental limitations adversely [a]ffect her ability to properly care and protect [her] children."

As for the children, Department's report recited that the children had received "optimal care" in the home of their paternal grandparents and "have blossomed."

Department recommended terminating reunification services and setting a 366.26 hearing. It reasoned: "Mother has no understanding of her need to change thereby making improvement in her actions hard to deal with. According to Dr. Day [*sic*], mother['s] previous therapist she is 'egocentronic, unable to recognize the need to change.' . . . There have been reasonable efforts given to assist the mother in meeting the orders of the court and the caseplan. . . . [¶] Due to the fact that mother has not complied with [the] court order by completing court ordered individual family therapy[,] returning the children [to her] would create a substantial risk to their physical and emotional well being. [Department] has no evidence to support that the problems that lead to the detention of the children have been alleviated."

The trial court, noting that more than 18 months had passed since the children were first detained, terminated reunification services and set the matter for a section 366.26 hearing on June 13, 2007. Mother's attorney filed a notice of intent to file a writ petition to contest the trial court's order but no petition was ever filed.

3. *Mother's Section 388 Petition*

On June 8, 2007, five days before the scheduled section 366.26 hearing, Mother (represented by new counsel) filed a section 388 petition seeking return of her children to her custody or "alternatively reinstatement of reunification services

and liberalization of visits." The petition was supported by a six-page declaration from Mother.

Mother's declaration began with a summary of the procedural history of the dependency proceeding. The next section was labeled "There Has Been A Significant Change in Circumstances." The heading, however, was a misnomer because that portion of Mother's declaration was not limited to setting forth developments which had occurred since the trial court terminated reunification services in February 2007. Instead, that portion of the declaration described in the most general of terms what Mother had done since the juvenile court had sustained the petition in November 2005. These actions included her visits with her children, her attempts to comply with court orders to obtain counseling, and her reconciliation with her own mother. Without reference to any specific date(s), Mother averred that "[r]ecently, at the end of our visits, my daughter started telling me she wanted to come home. . . . [¶] She is very aware of her surroundings and she knows the social worker wants her to be adopted, but she does not want me to leave her side."

In this section of the declaration, Mother noted only two new developments. The first was that she had "enrolled in a child development class for teachers so [she] can learn more about supervision and educational needs of [her] children and potential future students." Mother attached a copy of her class schedule but it did not support her characterization of the class as one involving child development. According to the schedule, she was enrolled in a class titled "Storytelling for Teach[e]rs." (Capitalization omitted.) The second new development was that Mother had "also started enrollment in free counseling sessions at the CSU, Los Angeles Student Health Center to help cope with the outcome of these court hearings." Mother averred her first appointment was set for May 29. Although her declaration was dated June 1, Mother did not set forth what happened at that first

appointment, and, more significantly, attached no documentary evidence to her declaration to establish either her enrollment in the counseling program or the focus of the counseling sessions. Furthermore, given Mother's statement made more than an year earlier in March 2006 to her social worker that she "has a guidance counselor at California State Los Angeles that she talks to whenever she feels the need to discuss her problems," her enrollment in the counseling sessions may well not have been a change of circumstance.

The next section of Mother's declaration was entitled: "It is in My Children's Best Interests to Modify the Current Orders." In it, Mother continued to deny that there had been any problems requiring Department's intervention. She described her life with her two children in general terms, claiming that she had "provided a stable and loving environment to them and we lived together as a true family" and that "[t]hey deserve to have this compassion and stability from [her] back in their lives [and] to re-establish our bond and relationship with the rest of their maternal family." Mother averred that she was "certain" that her children missed her as much as she missed them and that their separation "has caused [them] as much emotional distress as it has caused [her]." Mother conceded that her children had "behavioral problems" but declared that she "will work with . . . whoever [she] need[s] to in order to accommodate their special needs." Mother's declaration concluded: "I am able and willing to regain care for my children and can provide them with substantial security, health and welfare."

The juvenile court denied the section 388 petition without a hearing. It found that the best interests of the children would not be promoted by the proposed change of order and that the petition was "not timely; not in programs long

enough." For reasons not relevant to this appeal, the court continued the section 366.26 hearing,[7] and subsequently terminated Mother's parental rights.[8]

This appeal challenges only the trial court's summary denial of Mother's section 388 petition. (See fn. 8, *ante*.)

DISCUSSION

Mother contends that the trial court's summary denial of her section 388 petition was an abuse of discretion. She claims: "It was in the best interests of the children to grant an evidentiary hearing, because [her] attached declaration made a prima facie showing of changed circumstances." We are not persuaded.

Subdivision (a) of section 388 provides that in a dependency proceeding, a party, "may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made." Subdivision (c) explains that "[i]f it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held." Thus, the trial court has two options: (1) summarily deny the petition or (2) conduct a hearing. "[I]f the petition fails to state a change of

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[7] Department's initial report prepared for the section 366.26 hearing set forth the following. Mother's visits with her children had been "consistent and timely" and the children "were glad to see her." However, Aaron's "negative behavior escalate[d] following visits with his mother [because she] does not provide structured activities for him during his visits." The report indicated that the paternal grandparents wished to adopt the children; that an adoption home study had been approved for them; that they had "demonstrated an excellent ability to care" for the children; and that the children were "thriving" with them.

[8] On November 7, 2007, the trial court terminated Mother's parental rights. Mother's appeal from that order is presently pending in this court. (*In re Aaron L.*; B203842.)

circumstances or new evidence that might require a change of order, the court may deny the application ex parte." (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450.)

"The juvenile court's determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion. [Citations.] We must uphold [that denial] unless we can determine from the record that its decision[] "'exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citations.]'" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

When, as here, the trial court has previously ordered termination of reunification services and the section 388 petition is brought on the eve of a section 366.26 hearing, "the child's interest in stability is the court's foremost concern, outweighing the parent's interest in reunification." (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348.) Because reunification services have been terminated, the parent's interest in the care, custody and companionship of the child are no longer paramount. (*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.) In that regard, "[i]t is only common sense that in considering whether a juvenile court abuses its discretion in denying a section 388 motion, the gravity of the problem leading to the dependency, and the reason that problem was not overcome by the final review, must be taken into account." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531.)

In this case, Mother failed to make the necessary showing to obtain a hearing. "The [section 388] petition may not be conclusory. '[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence' is required. [Citation.] Successful petitions have included declarations or other attachments which demonstrate the showing the

[parent] will make at a hearing of the change in circumstances or new evidence." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.)

Here, Mother asserted she was enrolled in a child development class for teachers but the attached document (her schedule) did not support that claim. The schedule indicated instead that she was enrolled in "Storytelling for Teach[e]rs." Mother also averred that she had enrolled in counseling but offered no evidence to support that assertion. Further, her own characterization of the counseling services ("to help [her] cope with the outcome of these court hearings") belied her claim that her enrollment constituted a change in circumstance. The crux of Mother's problem was not her inability to cope with the dependency proceeding but her failure to recognize that she had emotional and cognitive limitations which severely undermined her ability to care for her children. In sum, Mother had been given multiple opportunities to address her problem (mental illness) but had failed to take advantage of those opportunities. Her enrollment in either the class or the counseling program did not constitute a change of circumstance.

Lastly, Mother's averments about her visits and relationship with her children were general and vague. Consequently, the petition did "not demonstrate how a change in the order[s removing the children from her custody and terminating reunification services] would be in the best interest of these children. [Citation.] At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification. [Citation.] Mother made no showing how it would be [in] the children's best interest to [resume] reunification services, to remove them from their comfortable and secure placement [with their paternal grandparents] to live with mother" who denied any problem in her parenting and who refused to acknowledge, let alone address, her severe emotional and cognitive problems which made her a continuing risk of

emotional, psychological and physical harm to her children. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252.)

To a certain extent, Mother argues for a contrary conclusion by relying upon evidence which was not offered to the trial court in the section 388 petition and which, in any event, would not have supported her petition. Her brief states: "The testimony of both Dr. O'Day and Dr. Garg would have supported a finding that Mother's emotional behavior was substantially changed from both the time of disposition and the subsequent termination of her reunification services. The[ir] statements . . . in the various social worker reports in the court file" coupled with Mother's declaration offered in support of the section 388 petition "were prima facie evidence of facts which would sustain a favorable decision." This argument fails for two separate reasons.

The first reason is that this claim was not raised in the trial court. Mother's section 388 petition did not include declarations from either doctor and her points and authorities did not refer to their earlier reports or ask the trial court to consider those reports. Because Mother never gave the trial court an opportunity to consider that evidence, she cannot now rely upon the doctors' reports or their purported testimony to urge that the trial court abused its discretion in denying her petition without a hearing. (See *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [failure to raise an issue in the trial court results in forfeiture of any appellate claim of error].)

The second reason Mother's argument fails is that, insofar as indicated by the record, neither doctor's opinion would have supported granting a hearing on the petition even if she had raised the point below. As noted earlier, at the November 2006 review hearing, Mother's counsel had agreed that Dr. O'Day's evaluation of Mother was not helpful and that she should be re-evaluated by Dr. Ward. As for Dr. Garg, after Department had found her psychiatric evaluation of

Mother to be inadequate (fn. 3, *ante*), Mother did not pursue the matter, thereby implicitly conceding that the doctor had nothing probative to offer. In sum, the reports of the those two doctors, whether taken singularly or collectively, do not support Mother's argument that the trial court abused its discretion in denying her petition without a hearing.

DISPOSITION

The order appealed from (summary denial of Mother's section 388 petition) is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.